ORIGINAL

No. 84-169

Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,

Petitioner,

v.

LARRY LEON CHANEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 730 F.2d 1334 (10th Cir. 1984). (Pet. Appendix A-2)

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, invalidating the death penalty and remanding, was entered on March 21, 1984. A petition for rehearing was denied on May 30, 1984. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides in part:

nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the State may constitutionally suppress F.B.I. witness statements which demonstrate the participation of persons other than the defendant in a capital case in the face of an explicit court order to produce such exculpatory evidence, where the State argues to the jury in support of the death penalty that there is no shred of evidence that anyone other than the defendant was involved in the crime.

STATEMENT OF THE CASE

The Suppressed Evidence Directly Contradicted the State's Theory of the Case

The case against Chaney was entirely circumstantial and premised upon his acting alone. Simply stated, the State's theory of the case was that Chaney, on the late morning of March 17, 1977, kidnapped two women in Jenks, Oklahoma, drove them some 100 miles to Sallisaw, Oklahoma, strangled them sometime that afternoon and buried them on his property near Sallisaw. See Map, Res. Appendix C1. The place of death was undetermined. Transportation to Sallisaw and back to Jenks was in a vehicle other than the victim's truck.

Petitioner, understandably perhaps, totally fails to disclose its theory of the case, as tried below, and thereby glosses over the obviously material and substantial character of the suppressed evidence. Also missing from the Petition is any acknowledgment that the State's theory that Chaney acted alone was its justification to the jury for imposition of the death penalty.

We first treat here the point - counterpoint between the evidence presented to the jury and the suppressed evidence, which consisted of four statements made to the F.B.I. by Mrs. Poppy Weaver, Kyle West, J.C. Hamilton, and Philip Ashmore, husband of one of the victims.

Evidence introduced at trial indicated the victims Kendal Inez Ashmore and Kathy Ann Brown were last seen alive at approximately 9:30 a.m. March 17, 1977, by Phillip Ashmore at his business in Tulsa, Oklahoma. The two women had come to borrow Ashmore's blue and white pickup truck. Neither was seen alive again except by Poppy Weaver, a witness who had known Mrs. Ashmore for years. In her statement to the F.B.I. Mrs. Weaver said that she saw Mrs. Ashmore with an unidentified man and woman in the Ashmore pickup truck in a neighborhood grocery store parking lot at 4:10 the afternoon of March 17, a time when according to the State's theory of the case, Mrs. Ashmore was already dead and buried, and Chaney was 100 miles away near the burial site.

Thus, at trial the prosecution established through two witnesses that Chaney was observed walking on his leased property near Sallisaw, Oklahoma at 4:30 p.m. on March 17. A third witness testified that he saw Chaney with dirt on his pants using the telephone in the witness' store near Sallisaw between 3:00 p.m. and 5:00 p.m. on the same afternoon. The time of this call was stipulated to be 4:39 p.m.

The State's testimony placed the time of death as the afternoon of March 17. Chaney v. Brown, 730 F.2d 1334, 1337 (10th Cir. 1984); Pet. Appendix 7. In the State's closing argument, the prosecution argued that Chaney buried the victims before going to use the telephone at 4:39 p.m. Weaver's statement not only showed Mrs. Ashmore alive at 4:10 p.m. on March 17, but it clearly requires the conclusion that Chaney was not acting alone.

Similarly, three of the four suppressed F.B.I. statements contradict the State's theory of the time, use, and location of Ashmore's blue and white pickup truck in the kidnapping, and support the thesis that Chaney did not act alone. The State argued that the truck was abandoned at the intersection of 91st and Memorial in the afternoon of March 17. The truck supposedly remained there until Mr. Ashmore's employee retrieved it at 9:00 a.m. on the 18th. Three suppressed statements say otherwise. Kyle West reported to the F.B.I. that on March 17 between 4:00 and 4:30 p.m. he observed a "shiny red pickup" with a "white stripe across it" and a "'clip-on' type CB antenna" at that corner. His observation of the intersection did not include any mention of a blue and white pickup. Res. Appendix B 5-6.

In another F.B.I. statement, J. C. Hamilton reported that he saw a truck arrive at the same intersection at about 8:00 a.m., March 18. The driver left the pickup, approached a waiting black car and left the area. Hamilton, interviewed on the 18th, identified the pickup as the same truck still parked at the intersection (the Ashmore truck). Res. Appendix B 3. The State submitted no evidence that connected Chaney with a black car.

Participation of others is also supported by Phillip Ashmore's suppressed statement relating that in the first,

unrecorded, extortion call, the caller specifically told him "there are four of us," "we're not kidding," and "we'll do her the same way." Res. Appendix B 10. Ashmore's suppressed statement also revealed that both Ashmore and his daughter attempted to call the telephone in the truck during the afternoon on March 17. Res. Appendix B 10. According to the statement, the phone was picked up and placed back on the receiver both times. While Mr. Ashmore testified at trial, his testimony omitted both the plural references, and the two disconnected attempts to telephone the truck. These incidents place someone in the truck between 3:00 p.m. and 5:00 p.m. on March 17 and corroborate Mrs. Weaver's observation of people in the pickup truck in the parking lot during this time period.

Much of this activity occurred while Chaney, according to the State, was 100 miles away in Sallisaw, where, again according to the State, the two women were already buried. Thus, the suppressed evidence flies in the face of the State's theory that Chaney acted alone, and is clearly exculpatory.

Chaney's Brady Request and the Trial Court's Order

The four witness statements withheld by the State were taken by the F.B.I. in March, 1977. Respondent's Motion to Produce was filed April 1, 1977, five months before trial. The Motion is reproduced in full in the Pet. Appendix D. We consider here those portions of the Motion pertinent to the issue of whether it was general or specific, in the context of the witness statements which were suppressed.

The Motion contained among its fifteen paragraphs, the following:

> 1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case, ...

2. Stenographic recordings or transcriptions of any oral statement made by any person to an agent of the State, an investigator or police officer at the Tulsa Police Department, a member of the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the subject matter of the case, ...

. . . .

4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

. . . .

13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement official.

730 F.2d at 1340; Pet. Appendix 26-29 (emphasis added in the opinion below).

This case involves more than a written request to the prosecutor from defense counsel. Although not discussed in the Petition, the trial judge entered an Order directing the State to provide certain evidence to the defendant.

The record reveals that on April 6, 1977 the District Court of Tulsa County responded to Chaney's requests by ordering the State to produce the following:

> Any and all other evidence now in the custody of the District Attorney's office, the Tulsa Police Department, the Tulsa County Sheriff's office, the Federal Bureau of Investigation, the State Crime Bureau for the State of Oklahoma, or any other agency of any State or Federal government, which may be favorable to the Defendant or is exculpatory.

730 F.2d at 1340-41; Pet. Appendix 29. (emphasis added in the opinion below).

The four suppressed statements first came to light in March, 1981 some three and half years after Chaney's trial, in response to Freedom of Information Act requests directed to the Federal Bureau of Investigation.

These disclosures led to a hearing in May, 1981 before the trial court where the prosecutor was questioned about his decision to suppress the statements. The prosecutor admitted that

he had possession of these statements by the time of the April 6 Order directing production. The effect of his testimony was not that because the Motion or Order was so general he simply overlooked the statements. Rather, he testified that in the context of the Motion and Order, he specifically reviewed these statements and determined to suppress them because in his view they were not exculpatory. In view of this conscious decision the State cannot (and the Petition does not) assert that it had no notice of what it had been ordered to produce. The prosecutor made this determination unilaterally -- he did not seek the trial court's assistance through in camera review.

The names of Weaver, West and Hamilton had never been disclosed in any context and there was no other way Chaney could have discovered them. None of the three testified at the trial. As noted by the Tenth Circuit at the oral argument before it, the State conceded that the requests were therefore as specific as they could be under the circumstances. The only thing missing from the Motion was the name of each of these witnesses. 730 F.2d at 1342; Pet. Appendix 35-36.

The Suppressed Evidence Was Material to Imposition of the Death Sentence

True to its theory of the case, the State argued at the penalty phase of the trial, that since Chaney acted alone the aggravating circumstances necessary for imposition of the death penalty were fully present. The jury agreed. Its verdict set forth the following aggravating circumstances:

> 1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 from the family of Kendal Inez Ashmore.

> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against defendant for the kidnapping charge.

730 F.2d at 1352, n.24; Pet. Appendix 85-86.

Each aggravating circumstance is premised upon Chaney's being the sole participant. Moreover, the prosecutor took full advantage of the suppressed evidence by arguing to the jury at the sentencing phase, "Has there been any shred of evidence in this case about anyone who committed this crime except Larry Chaney." 730 F.2d at 1352; Pet. Appendix 87.

The State admitted that the suppressed evidence was admissible at least at the penalty phase. 730 F.2d at 1354; Pet. Appendix 93. In view of the fact the suppressed evidence constituted the sole, independent evidence that Chaney acted in association with others, it can hardly be argued that the suppressed evidence was not relevant and material at the penalty stage.

ARGUMENT

This case is not an appropriate case for a grant of Writ of Certiorari. Simply, the case involves neither a change of law, nor a conflict among the circuits, but instead, demonstrates a careful application of established law. What this case presents is a defense request for evidence, a court order to produce, and well-settled law applied to the facts. Thus, this Court should not grant certiorari because this case merely applies faithfully the law of United States v. Agurs, 427 U.S. 97 (1976).

SUMMARY OF ARGUMENT

In opposition to the Petition we present these points:

1. With respect to Question One, under the circumstances presented the Brady request was specific and the prosecution actually was given notice of what was requested, but nevertheless suppressed the evidence because of its erroneous, unilateral determination that the statements were not exculpatory. The Court of Appeals correctly applied the Agurs general/specific criteria, and the alleged conflict among the circuits does not exist.

2. With respect to Question Two, as the State's demand for the death penalty was based entirely upon its theory that Chaney acted alone, and since the suppressed evidence was not cumulative and directly contradicted this theory, the Court of Appeals correctly applied Agurs' standard of materiality in determining that the suppressed evidence could have affected the jury's imposition of the death penalty. Since this mitigating evidence was withheld from the jury, the death penalty was correctly overturned by the Court of Appeals under Enmund v. Florida, 458 U.S. 782 (1982). There was no error, and there is no conflict among the circuits on this point.

Further, with regard to Question Two, Respondent's position is simply that the Petition presents no issue appropriate for review, as it improperly seeks this Court's revision of Oklahoma's death penalty statute to eliminate the statutory requirement of a unanimous jury verdict in support of the death penalty.

1. Chaney's Brady Request Was Specific, and In Fact Gave the Prosecution Notice of Exactly What Was Desired

The Petition distorts the issues in the case so severely that it presents a misleading view of the underpinnings of the opinion below. Buried on page twenty-eight of the petition is the State's first reference to Chaney's Brady request (Brady v. Maryland, 373 U.S. 83 (1963), in a terse, one sentence summary. Petitioner briefly paraphrases the Motion, omits mention of the trial court's Order for production of the statements and proceeds to apply its own analysis, ignoring the well reasoned and carefully documented Tenth Circuit analysis. The Petition thus fails to reveal what the case is about, and mischaracterizes the opinion below as guaranteeing defendants a constitutional right "to obtain mitigating evidence held by the prosecutor." Petition 47.

The Tenth Circuit was well-aware of the controlling legal standard for determining that a Brady request is specific, and correctly applied it. The court began the section of its opinion entitled "Characterization of Chaney's Brady request under Agurs" as follows:

> The Supreme Court discussed the distinction between general and specific Brady requests in Agurs. The Court stated that a general request "really gives the prosecutor no better notice than if no request is made." 427 U.S. at 106-07. As a result, the Court held that for purposes of applying the reasonable doubt test, "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." Id. at 107. In contrast, a specific request gives "the prosecutor notice of exactly what the defense desired." Id. (Footnote omitted).

730 F.2d at 1341; Pet. Appendix 31-32.

After discussing the Brady and Agurs guidelines and standards of materiality, the Tenth Circuit evaluated at length the

various parts of Chaney's Brady request. The court noted that the request included "transcription of any oral statement made by any person to . . . a member of any other governmental agency in connection with the subject matter of this case," as well as "all oral statements made to any . . . law enforcement official." 730 F.2d at 1341-42; Pet. Appendix 34-35 (emphasis added in the opinion below).

The Tenth Circuit continued its analysis:

> Here, all four of the withheld F.B.I. reports contain statements made to the F.B.I. by witnesses. Moreover, three of the reports contain the legend "date of transcription." The statements in the four F.B.I. reports thus clearly are covered by Chaney's Brady request. This request therefore gave the prosecutor "notice of exactly what the defense desired" under Agurs. Indeed, it is difficult to imagine how Chaney could have requested the reports with greater specificity without knowing the identity of three of the witnesses whose statements were included in the F.B.I. reports. The State conceded at oral argument before us that in such a situtation "[i]t may not be possible to be more specific" in formulating a Brady request, but contended that "it may be that this kind of request can always be considered general." Transcript of Oral Argument at 27-28. We disagree and hold that the request is specific because it gave the prosecutor "notice of exactly what the defense required" under Agurs, and because it was formulated in terms as specific as possible in the circumstances.

730 F.2d at 1342; Pet. Appendix 35-36.

No one can seriously argue that there was any way Chaney could have made a more specific request without knowing the identity of persons interviewed by the F.B.I. Chaney had no other source for learning of Weaver, Hamilton or West. They did not testify at the trial and were never mentioned by the State. We submit that in these circumstances, the Tenth Circuit correctly applied Agurs.

The State's Petition disingenuously argues that the text of the request is the only factor to be considered. This

Court's Agurs analysis however requires that all circumstances surrounding the request be considered as well as the language of the request itself. Agurs does not contemplate an a priori list of Brady - motion language, some words creating "general" requests and others labeled "specific." Instead, Agurs establishes a functional "notice" standard which courts must apply based on two considerations: (1) the particular facts surrounding the actual request and (2) the circumstances surrounding the actual evidence in question.

What the Tenth Circuit did in this case was examine Chaney's request and the actual evidence suppressed along with the factual circumstances surrounding both, and make a determination that there was sufficient notice to the prosecutor. The Respondent respectfully submits that this type of determination is exactly what is expected under Agurs and, therefore, is not appropriate for Supreme Court review.

Not only does the State stress the language of the request as the only consideration, the State fails to deal with the effect of the explicit order to produce. Here the trial judge entered an order for the State to disclose exculpatory evidence in the custody of the F.B.I. The Order meant precisely what it said and no other interpretation is possible.

The cases upon which the State seeks to demonstrate a conflict among the Circuits are irrelevant where a pretrial order has been entered and ignored and the undisclosed material involves evidence in mitigiation of the death penalty. When either of these two factors are considered no conflicting court of appeals decision exists. None of the cases relied upon as conflicting indicate that under these circumstances other courts of appeals would have reached a different result.

2. No Conflict Exists in the Courts of Appeals Which Requires Resolution by This Court.

None of the cases relied upon by Petitioner involved judicial approval of a prosecutor's suppression of witness statements, which would allow a capital defendant to show that others were involved in the crime, and thus, attempt to mitigate his sentence. The courts of appeals, contrary to the impression left by the Petitioner, do not operate in a vacuum and simply apply a litmus test to the text of Brady requests. Rather, the courts of appeals analyze Brady requests in the full context of each case. Petitioner cited numerous cases which found Brady requests to be general, but failed to show how the determination depended on the facts of the case. The Respondent will categorize the cases and then provide examples to the Court.

First, many of the cases cited involved primarily impeachment evidence. Second, in some cases the request was nonexistent or so casual that the very nature of the request distinguished the case from the carefully drafted pre-trial motion of the Chaney case. Third, in other cases the withheld evidence was actually known to the defendant or offered to defense counsel before the trial concluded. Finally, and most importantly, no case cited by Petitioner deals with the issue of suppressed statements which might have affected the jury's imposition of the death penalty.

The Petition, without disclosing the nature of the evidence withheld, cites, in support of its assertion that a conflict in the circuits exists, an array of circuit cases which involve only a prosecutor's suppression of trivial impeachment evidence e.g., Cramer v. Fahner, 683 F.2d 1376 (7th Cir. 1982); United States v. Mackey, 571 F.2d 376 (7th Cir. 1978); United States v. Cody, 722 F.2d 1052 (1st Cir. 1983); United States v.

DiCarlo, 575 F.2d 952 (1st Cir. 1978); United States v. Martorano, 663 F.2d 1113 (1st Cir. 1981); United States v. Menghi, 641 F.2d 72 (2d Cir. 1981); Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978); United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978); United States v. Lasky, 548 F.2d 835 (9th Cir. 1977). Petition 27-41.

Frequently in these cases, the reviewing courts concluded that the omitted evidence was merely additional material for impeaching an already thoroughly impeached witness, Mackey, 571 F.2d at 389, or that the jury was well aware that the witness's credibility was damaged and it would be unlikely that additional knowledge of promises or rewards would have weakened the State's case. Cody, 722 F.2d at 1062. The Martorano court found the impeachment weight of the suppressed evidence slight. "[T]he vein (questioning) would not have led to the mother lode; it would have petered out to nothing." Martorano, 663 F.2d at 1116. The DiCarlo court found no significance in the suppressed evidence.

Not only does Petitioner rely on cases which sustain the suppression of insignificant impeachment material, but many of its cited cases hold the suppressed evidence to be cumulative. Goldberg found the facts cumulative and intrinsically of questionable value, Goldberg, 582 F.2d at 490, so did Mackey, and Ostrer. Mackey, 571 F.2d at 389; Ostrer, 577 F.2d at 787.

In some of the cases cited, the request was vague or nonexistent. The Cramer opinion found no Brady request was made. Obviously, the suppressed evidence fell into the third Agurs category with the reasonable doubt standard properly applied. A statement by the prosecutor in United States v. Mangieri, 694 F.2d 1270, 1288 (D.C. Cir. 1982), that he had an understanding with the defendant that if documents turned up, he would supply them is hardly the type of request at issue in

Chaney. In Ostrer the defendant made no request but attempted to bootstrap himself with his codefendant's request.

Several of the cases cited by the State are inapplicable to the issue here because the defendant gained access to the suppressed evidence before the close of trial. For example in Menghi, the material was delivered to counsel before the defendant rested and in Mangieri, the government offered to let the defendant see the investigative file two months before trial. The reviewing court asserted that the suppressed evidence claim was merely a way to make up for a failure to make a timely objection to a government investigation. Similarly in Wagster v. Overberg, 560 F.2d 735 (6th Cir. 1977), the court determined the defendant was not prejudiced because the withheld statement was from a witness known to the defendant and the information was easily obtainable directly from the witness. Defense counsel had apparently neglected to interview the witness.

The Petitioner also relies on cases which involve requests which are obviously boilerplate and so broad that the request easily falls into the third Agurs category--requests so broad that they are no better notice of what is sought than if no request had been made. Mackey (request for "inconsistencies between statements given by any person," and general impeachment material); DiCarlo (all materials favorable to defendant or which would lead to impeachment); Mangieri (statement) by prosecutor to turn over documents if they turn up); Ostrer, (boilerplate - "all Brady material").

Other requests differ from Chaney's request because they, in effect, ask for everything e.g., United States v. Weiner, 578 F.2d 757 (9th Cir. 1978), (oral motion for all SEC transcripts, statements, interviews by F.B.I., post office, or anyone else). The court called this the shotgun approach, an equivalent to no request at all); Lasky (earlier request for

probation reports for 14 named persons quite specific but subsequent requests asked for all Brady material and then the entire file).

Petitioner relies heavily upon United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) which admittedly involved a Brady request with wording similar to Chaney's. Moore, however, differs dramatically from this case. First, the witness statement, which was not produced, was from a person whose identity was known to the defense. Second, the statement would, at best, only have given the defense minor cross examination material for use on an alibi defense. With two eyewitnesses to the barroom murder it is highly unlikely that the suppressed evidence would have mattered. Third, this Court had previously determined that the suppressed evidence was not material to the question of guilt and declined to reverse the conviction. Finally, the death sentence was not an issue in Moore because this Court had already reversed the death penalty. Moore v. Illinois, 408 U.S. 786, 798 (1972) reh. den. 409 U.S. 897.

In contrast to Moore, Chaney's conviction was based on circumstantial evidence, and the suppressed evidence of involvement of others went to the very heart of Chaney's efforts to mitigate punishment. Moore, on the other hand, was convicted by eyewitness testimony. The Moore court found the prosecution's failure to provide the items of evidence not material to the question of the defendant's guilt. Here, in making its determination that the suppressed evidence was material, the Tenth Circuit perceptively analyzed both the practical and the constitutional significance of the withheld evidence to Chaney's penalty phase. 730 F.2d at 1351-1357; Pet. Appendix 49-112. In comparison, none of the evidence withheld in Moore[1] comes close to being as significant.

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[1] The evidence is listed at Moore, 560 F.2d at 290.

The cases Petitioner asserts create a conflict on the general--specific Brady issue simply do not when they are examined. No case relied upon by Petitioner deals with the issue of suppressed evidence which is the defendant's best available evidence to offer as a mitigating factor against imposition of the death penalty.

In summary, the cases fall generally into three categories:

(1) Impeachment Evidence. Numerous cases stated that the suppressed evidence did not affect defendant's guilt or the suppressed evidence was not related to guilt, only impeachment. Thus, the undisclosed material did not go to substantive matters of guilt or punishment.

(2) In some cases the request was nonexistent or so casual that the very nature of the request distinguished the case from the carefully prepared, written pre-trial motion in this case.

(3) In other cases the undisclosed evidence was actually known to the defendant or offered to the defense counsel before the trial concluded. Thus, the defendant was not critically prejudiced.

The Tenth Circuit[2] made a well considered and appropriate

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[2] The Court, no doubt, is aware that the Tenth Circuit is experienced in applying the Agurs standard to Brady requests. (See 730 F.2d at 1340, n.7; Pet. Appendix 26, for list of Tenth circuit cases dealing with Brady requests.) The Tenth Circuit shows no bias in favor of either the prosecution or the defense in deciding these issues. A recent Tenth Circuit case, United States v. Warhop, 732 F.2d 775 (10th Cir. 1984) found no reversible error from nondisclosure of material deemed to be covered by a Brady request. Discusssing the Agurs categories, the Warhop opinion stated that "in all three situations, the burden is upon the defendant to prove: (1) the suppression of the evidence by the prosecution; (2) the favorable character of the suppressed evidence to the defense; and (3) the materiality of the suppressed evidence." Id. at 778.

In Warhop The Tenth Circuit found the request to Oklahoma authorities for any F.B.I. interview statements which tend to exculpate the defendant or impeach government witnesses to be a specific request, but held that the suppressed evidence had no material effect on the verdict and thus, no error was made.

decision. Faced with the facts confronting the court in the Chaney case, no other circuit would reach a different conclusion. Since no conflict exists among the circuits on the issues presented by this case, this Court should deny the Writ of Certiorari.

3. The Court of Appeals Correctly Applied Agurs' Standard of Materiality in Determining that the Suppressed Evidence Might Have Affected The Jury's Imposition of The Death Penalty.

Under Question Two, the State challenges the Tenth Circuit's application of the Agurs' standard of materiality of the suppressed evidence as it relates to imposition of the death penalty. It devotes only a few pages to the issue and admits that its position is grounded on its contention "that the discovery request in the present case was general in nature." Petition 45. As we have demonstrated above, Petitioner's contention is erroneous; therefore, its second question presented should also be rejected and the Writ of Certiorari be denied.

In this section Respondent will show that the Tenth Circuit correctly applied the Agurs' standard of materiality and thus, no manifest error requiring correction by this Court exists. Interestingly, Petitioner does not contend that any conflict in the Circuits exists on this issue.

The State's demand for the death penalty was based entirely upon its theory that Chaney acted alone. The Respondent asserts that the suppressed evidence contradicts this theory and is, therefore, material to his mitigation attempts at the penalty phase at trial.

The Tenth Circuit opinion thoroughly demonstrates the relevance and materiality of the suppressed evidence to the issue of mitigation. The court considered Mrs. Weaver's statement the most critical piece of suppressed evidence in the case.

730 F.2d at 1352-53; Pet. Appendix 87-88. Weaver's observation of Ashmore and an unknown man and women in the Ashmore pickup in the town of Jenks at 4:10 p.m. on March 17, placed the victim, still alive, over 100 miles from the Respondent. Since the State placed the time of death as the afternoon of March 17 and three State's witnesses placed Chaney near Sallisaw, Oklahoma, at the same time as Weaver's observation, the suppressed report supports Chaney's contention at sentencing that he was not present when the murders took place. 730 F.2d at 1353; Pet. Appendix 89.

The Tenth Circuit concluded:

> The evidence supports the inference that another person was involved because of the presence of the unidentified man with Mrs. Ashmore, while Chaney was placed over 100 miles away. Because the murders were said to have occurred that afternoon, Mrs. Ashmore's location in Jenks late that afternoon would place her over 100 miles away from Chaney at the time the State said that her murder occurred.

730 F.2d at 1353; Pet. Appendix 89.

In addition, the Tenth Circuit stressed the indicia of reliability in all the suppressed statements. Weaver's statement was made five days after the kidnapping to a responsible F.B.I. agent, and promptly recorded. Weaver, a neighbor of the Ashmores, was acquainted with Mrs. Ashmore and knew the Ashmore's pickup truck. The time of her observation was corroborated by a stipulation that the fire department's sirens sounded at the time she said they did. Similarly, the remaining reports were made under reliable circumstances; the statements were made to F.B.I. investigators within a two week period after the kidnappings and were recorded promptly. 730 F.2d at 1354-56; Pet. Appendix 95-102.

The Tenth Circuit thoroughly evaluated the evidentiary value of the remaining suppressed reports. 730 F.2d at

1355-56; Pet. Appendix 102-106. The court correctly focused on Hamilton's "evidence that the pickup truck's driver left in a waiting black car is indicative of another possible participant in the criminal venture." 730 F.2d at 1356; Pet. Appendix 104.

The court also disagreed with the State's position that West's statement "has totally no relationship to the case." 730 F.2d at 1356; Pet. Appendix 105. Since the State's theory describes the truck as abandoned before 5:00 to 6:00 p.m. at the 91st and Memorial intersection, West's observation at 4:00 to 4:30 p.m. and then again at 5:30 p.m. of a different truck in the intersection, with no mention of the Ashmore truck, does have a bearing on the case.

In discussing the fourth statement--Mr. Ashmore's--the Tenth Circuit agrees with the State that the plural references in Mr. Ashmore's statement duplicate evidence at trial. The court finds, however, that "the statements in all of the F.B.I. reports must be viewed together for their cumulative effect. As the Third Circuit has explained, '[c]ertainly, the effect of each non-disclosure not only must be considered alone, for the cumulative effect of the non-disclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial [or a resentencing proceeding].'" 730 F.2d at 1356; Pet. Appendix 106-07 (citing United States ex rel Marzeno v. Gengler, 574 F.2d 730, 736-737 (3rd. Cir. 1978)).

Mr. Ashmore's suppressed statement also reported that while working in his barn after 5:00 p.m. on March 17, he repeatedly tried to reach his wife on the pickup truck's mobile telephone. Ashmore stated that during one of the calls someone answered, but hung up the receiver without speaking.

As disclosed in his suppressed statement, Mr. Ashmore's daugher also had attempted to reach her mother on the mobile

phone after school the same day. She experienced the same sequence - someone answered the call and replaced the receiver without speaking. These incidents in Ashmore's suppressed statement corroborate Mrs. Weaver's statement that she saw three people in the Ashmore pickup truck during the same time period. Again, the impact of the evidence is that other people were involved in the kidnapping.

Thus, the withheld evidence was clearly material to the penalty stage. The Tenth Circuit found the suppressed material to be mitigating evidence "because it relates to the circumstances of the offense as a whole, and tends to support inferences that others were involved in the criminal episode, that Chaney may not have personally killed the victims, and that he may not have been present when they were killed." 730 F.2d at 1352; Pet. Appendix 83. The opinion properly relies upon Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), for the proposition that a defendant must be allowed to offer testimony of involvement of others in a murder as mitigating evidence at sentencing. The State's Brady violation prevented Chaney from making this offer.

Second, the Tenth Circuit opinion finds that admission of the suppressed evidence might have caused the jury not to find aggravating circumstances beyond a reasonable doubt. 730 F.2d at 1352; Pet. Appendix 84-86.

Third, at sentencing the jury instructions included permission to consider as mitigating circumstances whether the defendant was an accomplice in a murder committed by another. In response, the State argued to the jury that the instruction had no application and asked rhetorically if "there [had] been any shred of evidence in this case about anyone who committed this crime except Larry Chaney." 730 F.2d at 1352; Pet. Appendix 86-87 (emphasis in the original). The Tenth Circuit

concluded that the suppressed F.B.I. reports might have caused at least one juror to doubt the prosecutor's argument and vote differently on the death penalty. Thus, the court correctly applied Agurs' standard of materiality in determining that the suppressed evidence mig.t have affected the jury's imposition of the death penalty.

The Court of Appeals correctly overturned the death penalty under Enmund v. Florida, 458 U.S. 782 (1982) which held that imposition of the death penalty is unconstitutional in the absence of proof that Respondent "killed or attempted to kill, and regardless of whether [Respondent] intended or contemplated that life would be taken." Id. at 801. Since the suppressed evidence undermines the jury's finding of aggravating circumstances, required for the death penalty, the sentence was properly vacated.

4. The Second Issue Under Question Two Presents No Issue Appropriate for Review Here.

Petitioner's additional and inappropriate objective under Question Two is this Court's rewriting of Oklahoma's death penalty statute to exclude the statutory requirement of a unanimous jury verdict in support of the death penalty. Petitioner makes an alternative argument should the suppressed evidence be deemed material to punishment under Agurs. The State argues that where a unanimous verdict is required, the suppressed evidence must meet Agurs' "reasonable doubt" standard of materiality. Petitioner complains that the "might have affected" standard places too high a burden on the State, when imposing its death penalty. It argues that since a unanimous jury verdict is not constitutionally required, a Brady - Agurs standard which interferes with Oklahoma's requirement of a unanimous jury verdict for imposition of the death penalty is "an

unrealistically high barrier." Petition 46. Petitioner seeks a revision of Agurs to avoid its own statutory requirements. Obviously, this Court is not responsible for the inapplicability of Oklahoma's death penalty when a determination has been made under Agurs that the "might have affected" standard is appropriate. The State of Oklahoma writes its own statutes and must abide by the results.

CONCLUSION

For the foregoing reasons, Respondent, respectfully submits that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HOLLAND & HART

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APPENDIX A

Trial Court's Order

EDITOR'S NOTE

PAGES 1 thru end WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRICT COURT
FILED
MAY 9 1977
DON R. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,
Plaintiff,
vs
LARRY EUGENE CHANEY a/k/a LARRY LEE CHANEY,
Defendant.

Case Nos. CRF 77-755
CRF 77-756

O R D E R

Now on this 6th day of April, 1977 this matter comes on before me, the undersigned Judge of the District Court, upon the Defendant's formal motion to produce.

After reading the motion and hearing the evidence the Court finds that the motion should granted in part.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the State of Oklaoma produce for the Defendant's inspection and use the following material:

I.

Written or recorded statements ~~or summary of any such statements~~ made by the Defendant in this case, or copies of any statements, admissions, confessions, or declarations against interest ~~verbatim or otherwise~~ which have been made by the Defendant and the names of the persons taking such statements.

II.

Any and all other evidence now in the custody of the District Attorney's office, the Tulsa Police Department, the

Tulsa County Sheriff's office, the Federal Bureau of Investigation, the State Crime Bureau for the State of Oklahoma, or any other agency of any State or Federal government, which may be favorable to the Defendant or ~~is~~ is exculpatory.

III.

All reports of a scientific nature, and the subject matter of these reports, which may have been prepared by an expert, technologist, identification officer, or other scientific authority pertaining to any instrument, substance or means allegedly used in the commission of the crime and any report made or which may be made which relates to any fingerprints, ballistic reports, handwriting exemplars, hair samples, blood samples, or any photographs of the crime scene together with the prints, exemplars, samples, photographs or any scientific material relating to this case which may be exculpatory in nature or favorable to the Defendant.

IV.

Any physical or tangible objects in the possession of the District Attorney's office, the Tulsa Police Department, the Tulsa County Sheriff's office, the Oklahoma State Bureau of Investigation, or the Federal Bureau of Investigation, or any other governmental agency including, but not limited to, items taken from the Defendant's personal property, together with any written reports whether of a scientific nature or not ~~that~~ the State intends to use to connect or identify this Defendant with this alleged crime.

The Honorable Earl Truesdell
JUDGE OF THE DISTRICT COURT

APPENDIX B

F.B.I. Witness Reports

FEDERAL BUREAU OF INVESTIGATION

OKLAHOMA CITY	OKLAHOMA CITY	4/5/77	3/17/77 - 4/1/77

TITLE OF CASE
CHANGED
LARRY EUGENE CHANEY, aka
Larry L. Chaney
Larry Lee Chaney
Larry Leon Chaney
Lee Leonard Chaney;
KENDAL INEZ ASHMORE (Deceased)
VICTIM;
KAREN ANNE ENSOR (Deceased)
VICTIM

REPORT MADE BY: SA [redacted] BIC
CHARACTER OF CASE: KIDNAPING

Title marked changed to include correct spelling of first name and to include middle name of KENDAL INEZ ASHMORE and to add alias of subject as LARRY LEE CHANEY.

REFERENCES:

Oklahoma City telephone calls to the Bureau 3/17/77 and 3/18/77.
Oklahoma City teletypes to the Bureau 3/18, 19, 22 and 23/77.

- P -

ADMINISTRATIVE:

Although there is no apparent violation of the Federal Kidnaping Statute involved in this matter, upon the recommendation of

ACCOMPLISHMENTS CLAIMED | NO MORE | ACQUITTALS

(1) - Bureau
1 - USA, Tulsa
1 - Tulsa County District Attorney
S. M. FALLIS, JR.
2 - Oklahoma City (7-1327)

DO NOT WRITE IN SPACES BELOW

7-17007-15

REC-4
ST-10
DE-37
FBI

DATA PROC

84 APR 2 S 1977

COVER PAGE

OC 7-1327

U. S. Attorney NATHAN G. GRAHAM, NDO, Tulsa, a copy of this report is being furnished to Tulsa County District Attorney S. M. FALLIS, JR. for his assistance in the prosecution of subject in local court on charges of Kidnaping for Extortion and Murder.

LEAD:

OKLAHOMA CITY

AT TULSA, OKLAHOMA. Will follow local prosecution.

Bs
COVER PAGE

b7C
D

[redacted] He is presently caring for stock in the area of 91st Street and Memorial Avenue. He advised he rents this pasture land which he noted is located next to an unoccupied produce building and an abandoned house. He states he makes daily trips to this area for the purpose of tending to his stock.

[redacted] advised at approximately 7:30 A.M. this date he went outside of his residence which is located about one-quarter mile from the above intersection and fed his stock. He stated he then drove up to the rent pasture and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building. [redacted] stated this occurred between 8:00 and 8:30 A.M. and was positive on the time.

[redacted] stated the truck had just driven in and the man opened the door when he first observed it and therefore he could not tell the direction from which it had been driven. He stated the driver passed in front of the parked truck and walked over to a car that was waiting for him. He advised the car, which he could only describe as being black, was parked on the east side of the building facing south and he could only see a small part of the front end. He advised he did not know if there was another individual in the black car but assumed there was but could not give a description. He advised he saw all of this as he was pulling through the gate and did not actually see the truck driver get into the car but the next time he looked in that vicinity both the driver and the car was gone. He stated he did not know in what direction they had gone but he believes if they had driven west he would have observed them.

[redacted] advised the truck he observed is the truck that is still parked there at the present time in the same location.

All 26

3/18/77	Tulsa, Oklahoma	Oklahoma City	
SA [redacted]		File # 7-1327	
SA [redacted]		3/22/77	

b7C

30

He advised the man driving this truck which he observed from approximately 50 yards is a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat. No other description recalled. . . .

51

The following investigation was conducted by SA [redacted] b7c

AT TULSA, OKLAHOMA

[redacted] advised he was riding home from school on Thursday, March 17, 1977, on the Jenks Public School Bus and came to the intersection of 91st and Memorial, where the bus turns South on Memorial before arriving at East 86th.

[redacted] advised the time was approximately 4 or 4:30 P.M. and he noticed a new looking red pickup truck with a white stripe across it. He said the reason he noticed this truck was because it was shiny red and he observed a "clip-on" type CB antenna on the driver's side of the truck. [redacted] this truck was parked on the southside of the truck. [redacted] this truck was parked on the south side of the Bixby Produce Building, next to it, with the nose of the truck facing west. He further explained the truck was parked near the awning which hangs over the south side of the building.

[redacted] said he did not observe anyone near the truck at that time. He continued that he saw the truck again in the same place at approximately 5:30 P.M. when he was going to soccer practice the same day. [redacted] mother, [redacted] was present and advised [redacted] was familiar with pickup trucks, and said she was confident if he said the truck was red, she would believe it.

[redacted] advised the bus driver was [redacted], who drives bus No. 12 for the Jenks Public School and stated she would contact [redacted] and have her get in touch with the FBI. b7C,D

The following investigation was conducted by SA [redacted] b7C

On March 21, 1977, [redacted] telephonically advised that she drives the school bus for the Jenks Public School, which passes the intersection of East 91st and South Memorial. On the afternoon of March 17, 1977, she b7C

OC 7-1327

stopped at this intersection while she was driving on East 91st. There is a large amount of traffic at this intersection and she had to sit there for some period of time until she could turn onto South Memorial. She did not observe any vehicles parked in this area because she was so busy watching traffic. However, she was parked there attempting to turn onto Memorial for a long enough period of time that any of the children on the school bus could have accurately observed any vehicle parked there.

[redacted] stated that a school bus for the Union School System also turns at 91st and Memorial. This bus is unloaded of school children at the time it passes this intersection and the driver would have more time to observe things in the area.

b7C

FEDERAL BUREAU OF INVESTIGATION

1 — 3/30/77

[redacted] advised she lives in the vicinity of the ASHMORE residence and she is acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence. She advised she also recognizes the vehicles owned by the ASHMORE's. [redacted] stated that Payton's Grocery Store is located at 91st and Union Streets which is patronized by both Mrs. ASHMORE and herself.

b7C

b6

She advised at approximately 4:10 P.M. on Thursday, March 17, 1977, she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORE's. She advised this occurred in front of the Bell's Grocery Store, 301 E. Main, Jenks, Oklahoma. She advised she pulled in to the parking lot in front of Bell's Grocery Store and when she got out of her car she glanced over to a distance of about 8 or 9 parking spaces and saw Mrs. ASHMORE sitting in a truck with two other people. She advised Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side. She advised she could not describe either of the other two individuals nor could she describe Mrs. ASHMORE's wearing apparel.

She advised she had parked facing the street and Mrs. ASHMORE was parked facing the store west of her. She advised she could not see that there was any problem nor did she notice Mrs. ASHMORE looking at her or talking to anyone in the truck. She advised she just glanced at the truck, recognized Mrs. ASHMORE and turned to enter the store. She advised she came out approximately ten minutes later and the truck was gone.

She advised there were no other vehicles parked between her car and Mrs. ASHMORE's truck.

3/22/77 — Tulsa, Oklahoma — Oklahoma City 7-1327

[redacted] b7C — 3/28/77

She stated she is certain of the time in view of the fact she had picked her son up at school at 4:00 P.M. and drove straight to the store. She advised while in the store parking lot she recalled two firetrucks and two police cars with sirens went by the store.

FEDERAL BUREAU OF INVESTIGATION

1.

Date of transcription 3/23/77

PHILIP H. ASHMORE, 9148 S. Lord West Avenue, phone 299-9791, furnished the following information:

He is presently the owner of Kendalwood Corporation, a construction firm involved in building homes, apartments, etc., and in that connection has an office at a construction site at 5602 E. 46th Street, Tulsa.

On Thursday, March 17, 1977, he was at the site when he received a telephone call about 9 A.M. from his wife, KENDALL, who saidshe needed his pickup to have hay to feed the horses and to run some errands. She said she would be by at 9:30 but she was a little late and arrived around 10 A.M. accompanied by KATHY BROWN, an employee of ASHMORE.

He gave his pickup to his wife who left the family station wagon for him. He described the pickup as a 1976 3/4 ton Ford, light blue cab over white body, with a blue horizontal stripe. It has a large white tool box in the bed and is equipped with large wide tires; it also has a CB antenna in the center of the roof of the cab and a small mobile phone stinger antenna on the left side of the cab. The mobile phone number is 560-1736. He did not know the license number.

KENDALL said she was going to buy some hay for the horses and usually bought from [redacted] She made no mention of further plans for the day. b7C

He heard nothing further from his wife that day.

[redacted] About 5 P.M. he left his office and returned hom and noticed that some new hay had been put up in b7C

Interviewed on 3/17/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

SA [redacted] b7C

by SA [redacted] Date dictated 3/17/77

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

b7C

the barn. [redacted] continued to attempt to reach his wife on the mobile phone and on one occasion, someone apparently answered the call but put down without speaking. He thought [redacted] also had someone do the same thing during one of her calls. He made other calls after this but the mobile phone only rang.

b7C

He was in the tack room of his barn about 6:30 P.M. when he received a telephone call from an unknown man. ASHMORE reconstructed the conversation as follows but cannot recall the exact words:

"Are you Mr. ASHMORE?"

"Yes."

"You listen to me and you listen good. I've got your wife and that Honky who works for you. If your children want to see their mother again, you go down to the bank and get a half a million dollars in one hundred dollar bills and put it in a canvas sack. There are four of us. We're not kidding. If your wife tries anything like that Honky who works for you, we'll do her the same way."

"I haven't got that kind of money."

"Get what you can. I'll call you."

"When?"

"Tomorrow night."

"What time?"

"Late."

"You tell anyone who's looking for your wife that she's out looking at horses. Don't try any monkey business."

ASHMORE believed the caller to be a white male, about 45, spoke in a gruff, low voice with an apparent native Oklahoman accent. He heard no background noises and thought the call was local in nature.

He said a man called his wife about a week ago and made an appointment for Sunday, March 13, 1977, to bring two Morgan horses to Tulsa for KENDALL to appraise. The man, he thought, said he was from Arkansas and was selling some land to buy the horses but didn't know their value. The man never showed up but called back this week and made another appointment for Thursday. He recalled that the man claimed he would put the horses in a stable or barn in the Tulsa area and KENDALL would go there to see the horses. ASHMORE thought the stable was in Broken Arrow but LAURA thought it was in Sand Springs.

ASHMORE described his wife as a white female, born March 24, 1941, 5'6", 110, brunette, hazel eyes and having a small red spot on the right side of her forehead. She was wearing double diamond rings on left ring finger and a gold wristwatch with diamonds. She was wearing blue jeans, possibly a blue jean jacket and white jogging shoes with blue stripes, and carrying a tan leather shoulder strap purse with the initials "K.I.A."

KATHY BROWN is described as a white female, 23 years, 5'2", 150, lond blond hair, blue eyes. He could not recall her clothing. He recalled KATHY has a boy friend, name unknown, who is a truck driver and from the same town of Alagan (phonetic), Michigan. KATHY's parents are Mr. and Mrs. LAWRENCE BROWN, telephone 616-673-4827. KATHY has been employed as a horse trainer since June, 1976 and to his knowledge has no relatives in Oklahoma.

[redacted]

b7C

ASHMORE recalled that [redacted] had a riding lesson scheduled at 3:30 P.M. this date with KATHY BROWN but apparently was late, not arriving until 3:45 P.M. or 4:00 P.M.

b7C

[redacted]

b7C

ASHMORE said since receiving the original call, he has been extremely upset and possibly has forgotten other details which he would furnish later.

APPENDIX C

Map of Oklahoma

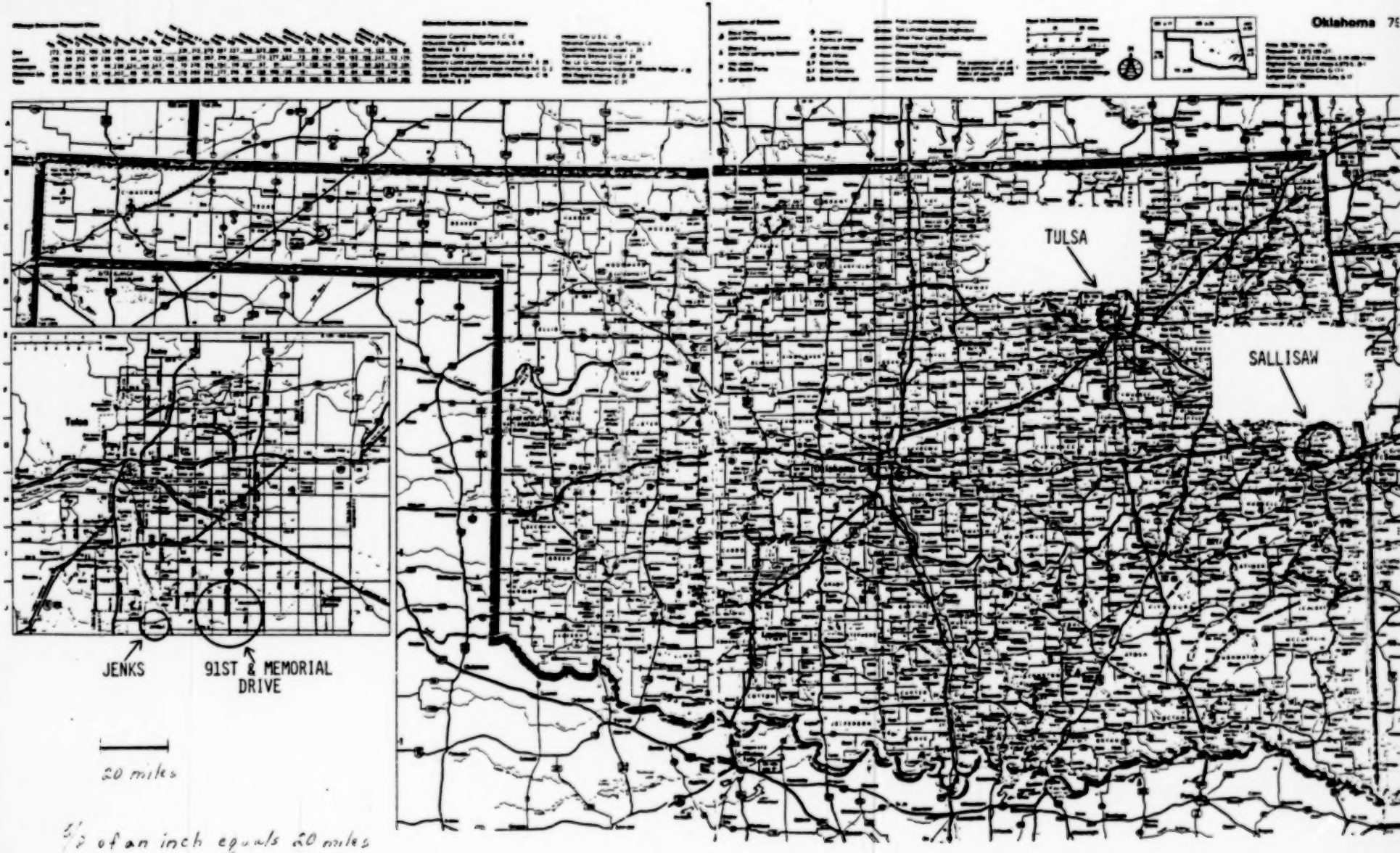
Oklahoma
TULSA
SALLISAW
JENKS
91ST & MEMORIAL
DRIVE
20 miles
½ of an inch equals 20 miles

EXHIBIT A